IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1081 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SOMABHAI NATHABHAI TALPADA & 3 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1 – 4.
MR BS SUPEHIA for Appellant(s) : 1 - 4.
MR ND GOHIL, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 01/11/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The appellants came to be tried for offences punishable under Sections 302, 326, 504 and 114 of I.P.C. by the Sessions Court, Kheda at Nadiad in Sessions Case No.81 of 1997. They came to be convicted for offences punishable under Section 302 read with Section 34 of I.P.C. for the offence of murder of Keshavbhai Madhavbhai Waghri allegedly committed by them on 21st February, 1997 at about 8.00 p.m. at village Khadol of Borsad taluka of Kheda district. They are sentenced to undergo imprisonment for life and to pay a fine of Rs.1,000/- each, in default, to undergo R.I. for two months by the Sessions Court by judgment and order dated September 30, 1997 passed in Sessions Case No.81 of 1997.

2. As per the prosecution case, Keshavbhai alias Keshubhai Madhavbhai Waghri was the son of accused no.3 – Naniben, wife of Madhavbhai Mohanbhai Talpada and brother of accused no.4 – Sarojben, wife of Babubhai Punambhai Talpada. Accused no.1 – Somabhai Nathabhai Talpada is the maternal uncle of deceased Keshavbhai and accused no.2 – Zaverbhai Babarbhai Talpada is the neighbour.

2.1 As per the prosecution case, the deceased was suffering from Tuberculosis and was being looked after by

his brother Jashubhai. The deceased, his wife Dhabuben and his brother Jashubhai were staying in the same house. The accused persons nurtured a feeling that Dhabuben and Jashubhai had illicit relations and the deceased was not able to stop their relationship. They, therefore, on the date of the incident, went to the house of the deceased and told the deceased that if he is not able to stop the illicit relationship of his brother and his wife and is not able to commit suicide, they may put him to fire and ultimately, the accused persons, by a joint effort, committed murder of the deceased by setting him ablaze after pouring kerosene. Jashubhai was present in the house. He, therefore, rushed to the place and put out the fire by pouring water and throwing a quilt. Jashubhai went to Anklav Police Station immediately and the deceased was taken to the Primary Medical Centre at Anklav and then was referred to S.S.G. Hospital at Baroda. F.I.R. of the deceased was recorded. The Executive Magistrate was summoned to record the dying declaration of the deceased who came and recorded the dying declaration. On the basis of the F.I.R., offence was registered and investigation started. During the course of treatment, the deceased died because of Septicemia. Post-mortem was performed and other investigations made. The police, having found sufficient material against the accused persons, filed chargesheet in the court of J.M.F.C., Borsad who, in turn, committed

the case to the Court of Sessions and Sessions Case No.81 of 1997 came to be registered.

2.2 Charge was framed against the accused persons at Exh.4. All of them pleaded not guilty to the charge and claimed to be tried. Evidence was led by the prosecution and the Trial Court came to the conclusion that the prosecution was successful in establishing the charges for offences punishable under Section 302 read with Section 34 of I.P.C. and recorded conviction therefor, awarding them imprisonment for life and fine, as stated above. It is this judgment and order which is the subject matter of challenge in appeal.

3. We have considered the record and proceedings and we have been taken through the record and proceedings both by learned advocate Mr. B.S. Supehia for the appellants and learned APP Mr. Gohil for the respondent.

4. We find that a number of witnesses have not supported the prosecution case but the Trial Court has recorded conviction mainly on the ground of a dying declaration given by the deceased before the Executive Magistrate and the F.I.R. which has assumed the nature of a dying declaration on demise of the deceased.

5. Learned advocate Mr. Supehia for the appellants submitted that the case depends mainly on the dying declaration before the Executive Magistrate and the F.I.R. According to Mr. Supehia, the relations between the deceased and the accused persons were strained and he has, therefore, falsely implicated the accused persons. The nature of injuries sustained by the deceased would go to show that if it was a case of homicidal burns, the areas affected would have been different. According to Mr. Supehia, the lower extremities have remained unaffected. If the kerosene was poured on the deceased, as is alleged, legs also would have got burnt which has not happened. According to Mr. Supehia, the possibility of the deceased having grievance against the accused persons for repeated taunting on account of alleged illicit relation of the wife of the deceased with Jashubhai cannot be ruled out. The deceased who was about to die has involved his close relatives in retaliation. Mr. Supehia submitted that the dying declaration would not inspire confidence if the evidence in relation to other surrounding circumstances is seen. He submitted that the deceased has made suitable shifts from his versions given to the doctor, to the police and to the Executive Magistrate. It is also submitted that the incident appears to have occurred inside the house as

per panchnama but according to the deceased, the incident has occurred outside the house. If there is controversy about the place of incident, then scant nature of other evidence should give benefit to the accused which has not been considered by the Trial Court. Mr. Supehia, therefore, submitted that the accused persons may be given benefit of doubt by allowing the appeal and setting aside the judgment and order.

6. Learned APP Mr. Gohil has opposed this appeal. According to him, the parties are known to each other. There is no material to show that the deceased had any animosity with the accused persons. The two lady convicts are mother and sister of the deceased. One of the other convicts is his maternal uncle and the other is a neighbour. They are all known persons and there was no need for the deceased to falsely implicate them. According to Mr. Gohil, there is no discrepancy so far as evidence relating to the place of incident is concerned. The incident has occurred in a small house having an 'ota' and a room. There is not even a door to the house and the incident has occurred around the open entry section to the house. Given a harmonious reading, the evidence would indicate that just before the incident, the deceased was sitting outside the house. He does not say that the incident has occurred outside the house. In

this regard, the panchnama of the place of incident and the map of the place of incident would crease out the alleged discrepancies. Mr. Gohil, therefore, submitted that the Trial Court has taken into consideration all these aspects while recording conviction. There is no material to conclude that the evidence is insufficient or unreliable. The conviction is, therefore, rightly recorded and the appeal may, therefore, be dismissed.

7. We have given a close look to the evidence led by the prosecution. Dr. Nayan Keshubhai Modi is examined at Exh.28. He had performed the post-mortem. According to him, the face and the neck, the chest and the back, some part of the abdomen and left hand had sustained burns. The right hand was not burnt and there were marks of ink on the right thumb. The injuries were ante-mortem and were sufficient in the ordinary course of nature to cause death. According to him, the deceased died of Septicemia. During cross-examination, he states that the burns were of 55-60%. The injuries on face were likely to cause difficulty for the deceased to speak.

7.1 The post-mortem notes are produced at Exh.29 which conform to the evidence of the doctor.

7.2 This indicates that there is no specific medical evidence to suggest that the burns suffered by the deceased could have been accidental or suicidal. No such suggestion is even made during cross-examination. The medical evidence is that the burns were ante-mortem and that they were sufficient in the ordinary course of nature to cause death.

8. The medical case papers at Exh.34 and 34/A indicate that the doctors have recorded a history of **homicidal** flame burns injury by uncle around 10.00 p.m. on 21st February, 1997 at Umeta. It is also recorded that the patient was all right before 8.00 p.m. on 21st February, 1997 at Umeta when his uncle Mr. Somabhai poured kerosene on him and his neighbour Zaver flamed him and he sustained injuries.

8.1 The medical case papers of Anklav (Exh.17) also indicate that the doctor recorded history of alleged **assault by burns** at 8.00 p.m. on 21st February, 1997. The contents of the medical case papers have been proved through deposition of Dr. Subhashchandra Jethanand Ramani at Exh.14.

9. After these histories were recorded, the F.I.R.

of the deceased came to be recorded by the police. That F.I.R. is produced at Exh.40 where the deceased has, in clear terms, stated that on the date of incident at about 8.00 p.m., while he was sitting outside the house, his mother, his sister Saroj, his maternal uncle Somabhai and Zaverbhai came and started giving abuses and told him that his wife Dhabu is maintaining illicit relations with Jashu and if you are not able to stop it or if you are not able to commit suicide, we can put you to fire and that why is he spoiling the image of the family. The deceased, in reply, told them that Jashu and his wife are looking after him as he is suffering from Tuberculosis and he has not noticed any illicit relations between Jashu and his wife and on his saying so, his maternal uncle went into the house, poured kerosene from a stove into a glass and then the two lady accused persons caught hold of the deceased and told Somabhai to pour kerosene and set the deceased ablaze. Somabhai, therefore, poured kerosene and Zaverbhai set the deceased ablaze with a matchstick. Jashu, at that time, came and extinguished the fire. The wife of the deceased had gone to attend to nature's call.

9.1 Executive Magistrate Malek Ismailmiya Husenmiya has deposed at Exh.30. He states that on receiving yadi, he went to the hospital to record the dying declaration.

The yadi carried an endorsement of the doctor that the patient was conscious. After going to the hospital, he verified the identity of the patient, interrogated the deceased Keshubhai Madhavbhai to satisfy himself whether the deceased was fully conscious and then started recording the dying declaration. He recorded the dying declaration in a question-answer form in the language of the deceased and then obtained the right thumb impression thereunder. The witness said that he recorded the dying declaration as per the say of the deceased. He has also proved the contents of the dying declaration. The dying declaration is produced at Exh.31.

10. On going through these pieces of evidence, we find that a conjoint reading of the medical evidence and the dying declaration would indicate that the deceased met with a homicidal death.

11. We also find that there is consistent evidence in the form of case history given to the doctors both at Anklav and Baroda about homicidal burns caused to the deceased. Both the F.I.R. and the dying declaration before the Executive Magistrate clearly implicate all four accused persons. It is true that there is no allegation against the two lady accused persons in history recorded by doctor in medical case papers but

then, the evidence in the form of F.I.R. and the dying declaration are consistent. They are recorded almost in succession and in our opinion, there was no scope for any improvement or tutoring in between. So far as the recording of F.I.R. or the dying declaration is concerned, learned advocate Mr. Supehia has not challenged that act of record or has not alleged any defect or infirmity to render recording of the F.I.R. or the dying declaration susceptible to doubt. It was contended that both the F.I.R. and the dying declaration are not truthful. The only allegation is that the deceased was bent upon to falsely implicate the accused persons. In this regard, there is not a whisper in the evidence even in the form of suggestion to the witnesses and in our opinion, therefore, the Trial Court cannot be said to have committed any error in recording conviction.

12. It is true that a specific endorsement on the dying declaration regarding the deceased being fully conscious and well-oriented is not obtained on the dying declaration but the Executive Magistrate has himself verified this aspect before recording the dying declaration as can be seen from his evidence. We can safely rely on his ability and prudence which is recorded by an independent officer of the rank of Executive Magistrate and there is no reason to suspect any foul

play or to doubt his ability in assessing the consciousness or orientation of the deceased.

13. We do not find any force in the contention that the evidence on place of incident is inconsistent and doubtful. The F.I.R. indicates that just before the incident the deceased was sitting on 'otla' when the assailants came. Thereafter, it does not appear from F.I.R. that the incident took place only at that place. The map of place of incident and panchnama of place of incident make the picture clear. As such we do not find any discrepancy in the evidence as to place of incident. Further, the evidence in form of dying declaration is so strong that the discrepancy canvassed would pale out into insignificance.

14. We also notice that some of the witnesses have not supported the prosecution case fully but that will not abrogate the effect of independent and clinching evidence coming from the independent witnesses and, therefore, we find no merit in the appeal. The appeal, therefore, has to fail.

15. The appeal stands dismissed. The judgment and order dated 30th September, 1997 rendered by the learned

Additional Sessions Judge, Kheda at Nadiad in Sessions Case No.81 of 1997 is confirmed.

16. We are informed that the sentences of appellant no.2 – Zaverbhai Babarbhai Talpada, appellant no.3 – Sarojben Babubhai Talpada and appellant no.4 – Naniben W/o Madhavbhai Talpada have been suspended during the pendency of the appeal and they are on bail. They shall surrender to custody forthwith.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

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